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SUBJECT: UPDATE ON THE ECCC; DAVID SCHEFFER COMING TO CAMBODIA

REF: USUN NY 16

¶1. (SBU) Summary. The Open Society's Justice Initiative (OSJI) has requested and will fund former Ambassador David Scheffer to visit Cambodia from January 19-21 to intervene with senior RGC officials on the future of the Extraordinary Chambers in the Courts of Cambodia (ECCC). Recent OSJI discussions with members of the ECCC, both international and Cambodian, indicate a significant difference on views as to how long the review process for internal rules should take, with the international judges committed to resolving most, if not all, the rules and procedures by month's end so that a March plenary of all the judges can be scheduled. The Cambodians, according to OSJI sources, foresee this process unfolding over the course of weeks and even months, with additional rounds of discussion possible. ECCC staff are concerned that the international jurists may pull out if the two sides cannot resolve most differences in short order. Total outstanding issues have narrowed to approximately a dozen; there are five substantive points of contention that affect the independence and legitimacy of the ECCC. OSJI reported that the decision to bring David Scheffer came at the behest of some ECCC staff; Scheffer has agreed to come. End Summary.

ECCC's Review Committee Begins to Work

¶2. (SBU) On January 16, Pol/Econ Chief met with Heather Ryan, OSJI's resident Khmer Rouge Tribunal monitor, and Tracey Gurd, an OSJI legal officer visiting from New York. Ryan related that recent discussions with ECCC staff indicated concerns on the international side regarding the review committee's prospects for success at the conclusion of their current session, which began on January 16 and is scheduled to conclude on January 26. ECCC sources informed Ryan that their conversations with Cambodian counterparts suggested that the Cambodian judges had met prior to the beginning of the session, and had reportedly become even more entrenched in their position going into the two weeks of meetings. In addition, said Ryan, OSJI's own soundings among the Cambodian judges indicated that the Cambodian side views the two-week review committee session as just the beginning of what could be a longer process of negotiation and discussion of the rules -- one that could last weeks or even months. The international judges, continued Ryan, want to resolve the differences surrounding the rules during the two-week session, or come close enough that both sides are confident that a third plenary session in March will be successful and the rules agreed upon at that time.

¶3. (SBU) Ryan was aware that the Group of Interested States (GIS) had met in New York (reftel). She wondered if the donors were pushing the Cambodian government and delivering messages of concern. Pol/Econ Chief confirmed that key missions were privately conveying strong messages to senior RGC officials. Ryan noted that ECCC staff had asked OSJI to invite David Scheffer, former US Ambassador-at-Large for War Crimes, to visit Cambodia before the review committee's session ended to discuss the ECCC's future with DPM Sok An and ensure the two-week session does not end in failure. Ryan explained that concerned ECCC staff considered Scheffer as the best choice to intervene, as he is viewed (by the RGC) as a friend of Cambodia for his work in restarting the negotiations between the RGC and the UN over formation of the Tribunal. OSJI/New York agreed to fund Scheffer's travel, and the latter is scheduled to arrive on January 19 and depart on January 21; Ryan noted that there is not yet confirmation that Scheffer will be able to meet with DPM Sok An.

Sticking Points

¶4. (SBU) Ryan mentioned that her discussions with the ECCC's Marcel Lemoine (international co-investigating judge and member of the drafting committee for the rules as well as the review committee) indicate that there remain about a dozen or so points of difference between the international and Cambodian sides regarding rules and procedures. Roughly half of those are potential deal breakers, noted Ryan, as they impinge on the independence and integrity of the court. The Cambodian side does not wish to address the role of the defense counsel office in the rules; rather, they proposed that all issues pertaining to the defense be decided by the

Cambodian Bar Association. Given the history of political interference in the Bar, this is an impossible proposition, noted Ryan. There remains disagreement over the participation by international defense counsel, said Ryan, which would call into question the fairness of the process if Cambodian defendants only had Cambodian lawyers in the courtroom with them (i.e., the equality of arms issue). According to Ryan's sources at the ECCC, the Cambodian proposals suggest that the Cambodian side is seeking control over the entire process or a way to render it meaningless. For instance, the Cambodian judges have proposed that if there is disagreement over whether or not an investigation will result in an indictment, that the person under investigation may appeal to the Pre-Trial Chamber. If there is no supermajority, the case will be dropped. (Note: Under the RGC/UN Agreement, such cases would go forward to trial; convictions, however, would require a supermajority. End Note.) Ryan noted that under such a system, the RGC would have total veto power over each indictment.

¶5. (SBU) The Cambodians had also requested that Cambodian law relating to defamation also be applied to the court's proceedings. They have reportedly changed their proposal to perjury, said Ryan, but want perjury cases to be referred to the Cambodian court system for a determination rather than be examined by the ECCC. Ryan said that the Cambodian courts would be unlikely arbiters of such cases in a politically nonbiased way, and would serve as a deterrent for witness testimony. The Cambodians continue to insist on in absentia trials, despite the international judges argument that absentia trials do not meet international standards and their use has been rejected by other international tribunals. One new area where the Cambodian judges have departed from the draft rules concerns the participation by civil parties. Although permitted under Cambodian law, the Cambodian judges recently indicated that they do not favor victims coming forward as civil parties. Ryan said that there is speculation at the ECCC that this change of heart reflects RGC fear of encouraging people to submit new evidence. (Note: The Japanese Embassy was particularly unhappy over this provision as well, although for financial and administrative reasons. Their influence with the RGC may

also be a factor in the Cambodian decision to question the rules surrounding victims and witnesses as civil parties.
End Note.)

Japan: Still Cautiously Optimistic

¶6. (SBU) Pol/Econ Chief conferred on January 17 with the Japanese Embassy to see if they had heard similar rumblings. In characteristic style, the Japanese Counselor handling the KRT, Yoshi Kodama, said he was unaware of any problems, although he did allow that the UN Administrative Office (and we can only assume this is Sean Vissoth) is preparing a compromise document on legal matters to provide to both sides for consideration during the review committee meetings. Kodama noted that the Japanese Ambassador would be meeting with DPM Sok An next week and the progress of the review committee would likely come up in the discussion.

Comment

¶7. (SBU) The first day's discussions on January 16 reportedly went well, according to one international judge, who allowed that was likely because the two sides only discussed the "easy stuff." At this stage, we can only wait and see how the discussions between the international and Cambodian judges develop, and whether there is room for compromise. We plan to see David Scheffer and will provide a readout of his discussions in Phnom Penh. End Comment.

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